

NYCTL 2015-A Trust v Hau Yiu Cheng

2017 NY Slip Op 30869(U)

March 15, 2017

Supreme Court, Queens County

Docket Number: 705147/2016

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

NYCTL 2015-A TRUST, and THE BANK OF NEW
YORK MELLON as Collateral Agent and Custodian
for the NYCTL 2015-A Trust,

Plaintiffs,

- against-

HAU YIU CHENG, LONG MEI KONG, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
VERICRREST FINANCIAL INC., CAPITAL ONE
BANK (USA) N.A., CALIBER HOME LOANS INC.,
NEW YORK CITY TRANSIT ADJUDICATION
BUREAU and "JOHN DOE No. 1" through "JOHN
DOE No. 100" inclusive, the names of the last 100
defendants being fictitious, the true names of said
defendants being unknown to plaintiff, it being intended
to designate fee owners, tenants or occupants of the
liened premises and/or persons or parties having or
claiming an interest in or a lien upon the liened premises,
if the aforesaid individual defendants are living, and if
any or all of said individual defendants be dead, their
heirs at law, next of kin, distributees, executors,
administrators, trustees, committees, devisees, legatees,
and the assignees, lienors, creditors and successors in
interest of them, and generally all persons having or
claiming under, by, through, or against the said
defendants named as a class, of any right, title, or
interest in or lien upon the premises described in the
complaint herein,

Index No. 705147/16

Motion

Date November 2, 2016

Motion

Cal. No. 116

Motion

Seq. No. 1

The following papers read on this motion by plaintiffs, NYCTL 2015-A Trust (Trust) and Bank of New York Mellon, as collateral agent and custodian for the Trust (BNYM), pursuant to CPLR 3212(b), for summary judgment against defendants, Hau Yiu Cheng and Long Mei Kong, and to strike the answer of defendants, Hau Yiu Cheng and Long Mei Kong, pursuant to RPAPL 1321, for leave to appoint a referee to ascertain and compute the amounts due and owing plaintiffs upon the tax lien being foreclosed in this action, and to examine and report

whether the subject property can be sold in one or more parcels, and for leave to amend the caption substituting Yiu Hau, Ai Liu, “John Doe No. 3 (Refused Name),” and “John Doe No. 4 (Refused Name)” for “John Doe No. 1,” “John Doe No. 2,” “John Doe No. 3” and “John Doe No. 4,” respectively, and excising reference to defendants “John Doe No. 5” through “John Doe No. 100” and discontinuing the action as against them.

Papers
Numbered

Notice of Motion - Affirmation - Exhibits.....	EF Doc. #24-#37
Affirmation in Opposition - Exhibits.....	EF Doc. #38-#42
Reply Affirmation.....	EF Doc. #43-#46

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiffs Trust and BNYM commenced this action on April 29, 2016, to foreclose a tax lien on real property known as 43-31 Bowne Street, Flushing, New York (Block 5195, Lot 12) (the subject property) owned by defendants, Hau Yiu Cheng and Long Mei Kong. Plaintiffs allege that the Trust is the owner of the tax lien certificate and BNYM is the collateral agent and custodian for the Trust, and that defendants, Hau Yiu Cheng and Long Mei Kong, failed to pay the semi-annual interest due on the tax lien balance on or before December 29, 2015, more than seven months after the sale of the tax lien to plaintiffs. Plaintiffs also allege that by reason of this default, they elect to foreclose the tax lien.

Defendant, Hau Yiu Cheng and Long Mei Kong, served a joint answer with various affirmative defenses. Defendants, New York City Parking Violations Bureau, New York City Environmental Control Board, Vericrest Financial Inc., Capital One Bank (USA) N.A., Caliber Home Loans Inc., New York City Transit Adjudication Bureau, Yiu Hau s/h/a “John Doe No. 1,” Ai Liu s/h/a “John Doe No. 2,” “John Doe No. 3 (Refused Name)” s/h/a “John Doe No. 3,” and “John Doe No. 4 (Refused Name)” s/h/a “John Doe No. 4” are in default in appearing or answering. Plaintiffs did not cause defendants, “John Doe No. 5” through “John Doe No. 100” to be served with process, having determined they are not necessary party defendants to the action.

Defendants, Hau Yiu Cheng and Long Mei Kong, oppose the motion. The remaining defendants have not appeared in relation to the motion.

That branch of the motion by plaintiffs for leave to amend the caption substituting Yiu Hau for defendant, “John Doe No. 1,” Ai Liu for defendant, “John Doe No. 2,” “John Doe No. 3 (Refused Name)” for defendant, “John Doe No. 3” and “John Doe No. 4 (Refused Name)” for defendant, “John Doe No. 4,” and deleting reference to defendants, “John Doe No. 5” through “John Doe No. 100,” is granted. That branch of the motion by plaintiffs to discontinue the action against defendants, “John Doe No. 5” through “John Doe No. 100,” is

denied as moot.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

NYCTL 2015-A TRUST, AND THE BANK OF NEW YORK MELLON AS COLLATERAL AGENT AND CUSTODIAN FOR THE NYCTL 2015-A TRUST, Index No. 705147/2016

Plaintiffs,

-against-

HAU YIU CHENG, LONG MEI KONG, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, VERICRREST FINANCIAL INC., CAPITAL ONE BANK (USA) N. A., CALIBER HOME LOANS INC., NEW YORK CITY TRANSIT ADJUDICATION BUREAU, YIU HAU, AI LIU, “JOHN DOE NO. 3 (REFUSED NAME), and “JOHN DOE NO. 4 (REFUSED NAME),”

Defendants.

It is well-established that the proponent of a summary judgment motion “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiffs submit, among other things, a copy of the pleadings and the tax lien certificate dated August 5, 2015 (Tax Lien Certificate No. 4A), indicating the existence of the tax lien against the property, their attorney’s affirmation, an affidavit of Matthew Nims, the authorized signatory of MTAG Services, LLC, plaintiffs’ servicing agent, and a copy of the servicing agreement and power of attorney. Mr. Nims, in his affidavit, indicates that plaintiffs are the holders of the tax lien certificate and that defendants, Hau Yiu Cheng and Long Mei Kong, failed to pay the semi-annual interest which accrued on the tax lien balance within six months after August 5, 2015, the date of the tax lien sale.

Defendants, Hau Yiu Cheng and Long Mei Kong, assert there are no unpaid real property taxes associated with the subject property and they made monthly mortgage payments, including real property taxes, through the escrow account of a loan company and never have missed a payment due date. The subject tax lien does not contain a real property tax component, but rather consists of \$1482.23 in unpaid emergency repair charges levied against the property, \$219.91 in noticing (advertising) fees, and \$85.11 representing a surcharge, for a total lien amount of \$1787.25. Defendants, Hau Yiu Cheng and Long Mei Kong, make no claim that they paid the emergency repair charges when due, and defendant, Hau Yiu Cheng, concedes they do not dispute the amount of such unpaid charges (*see NYCTL 1999-1 Trust v Stark*, 21 AD3d 402, 403 [2d Dept 2005]). Rather, they dispute the “related liens, interest, penalties, and attorney’s fees that have accrued as a result of the default in question.”

To the extent defendants, Hau Yiu Cheng and Long Mei Kong, dispute that the unpaid emergency repair charges may result in a lien against their property, the Administrative Code of the City of New York [hereinafter Administrative Code] provides that an emergency repair charge constitutes a lien upon the premises when the charge is due and payable (*see* Administrative Code § 27-2144[b]). In addition, the Department of Finance is obligated to apply and receive interest on the unpaid charge, and that the unpaid charge and the interest thereon becomes, and continues to be, a lien on the premises (*see* Administrative Code § 27-2144[e]). Furthermore, such lien is a tax lien within the meaning of Administrative Code §§ 11-309 and 11-401 and may be sold, enforced or foreclosed in the manner provided in chapters three and four of title eleven of the Administrative Code or may be satisfied in accordance with RPAPL 1354 (*see* Administrative Code § 21-2144[e]). The holder of the tax lien certificate is entitled to receive and retain a surcharge (computed at 5% of the lien [*see* Administrative Code § 11-332(b)]) and the costs of any advertisements and notices (*see* Administrative Code § 11-332(b)). The subject tax lien certificate lists no penalties. Administrative Code § 11-335 expressly provides that “[a] plaintiff in an action to foreclose a tax lien shall recover reasonable attorney’s fees for maintaining such action.”

To the extent defendants, Hau Yiu Cheng and Long Mei Kong, assert plaintiffs failed to notify them of the “default in question,” the tax lienholder can bring a foreclosure action within one year after the lien sale date if the lien is not paid in full, or may bring such action earlier than one year after the lien sale date if the semi-annual interest payment is not paid within 30 days of the payment due date (*see* Administrative Code § 11-332).¹ However, pursuant to Administrative Code § 11-320(b)(1), “[a] tax lien shall not be sold unless the commissioner of finance, or his or her designee, notifies the owner of record at the address or record ... by first

¹

Although defendants, Hau Yiu Cheng and Long Mei Kong, cite to Real Property Tax Law § 1190, the City of New York has not adopted the provisions of the Uniform Delinquent Tax Enforcement Act (Real Property Tax Law §§ 1100 to 1194) and therefore RPTL 1190 is inapplicable to the City’s tax liens (*see Hirsch v Approved Properties, Inc.*, 16 AD2d 674 [2d Dept 1962] [decided under former law]; 17 Carmody-Wait 2d § 99:69).

class mail, of the intention to sell the tax lien,” and “[s]uch notice shall state that if default continues to be made of the amounts due on such property, the tax lien on such property shall be sold as provided in section 11-319 of ... chapter [3 of title 11].” “The failure to provide a property owner with actual notice of a tax lien sale is a deprivation of due process (*see McCann v Scaduto*, 71 NY2d 164, 170 [1987]; *Szal v Pearson*, 289 AD2d 562 [2d Dept 2001]; *Meadow Farm Realty Corp. v Pekich*, 251 AD2d 634 [2d Dept 1998])” (*NYCTL 2009-A v Morris*, 144 AD3d 649 [2d Dept 2016]). Thus, the proper furnishing of a constitutionally adequate notice of a sale of a tax lien is a mandatory condition or a condition precedent to the commencement of a tax lien foreclosure action, and the plaintiff in a tax lien foreclosure action has the burden of demonstrating compliance with it (*see NYCTL 2009-A v Morris*, 144 AD3d 649 [2d Dept 2016]). Administrative Code § 11-320(b) (1) requires that the notice of the intention to sell the tax lien be mailed by first class mail to the property owner, and such other persons who registered pursuant to Administrative Code § 11-309, four times: not less than 90, 60, 30 and ten days prior to the date of the sale. Such pre-sale notice provisions found in section 11-320 of the Administrative Code, as applied to owners of real property, satisfy the minimum requirements of due process, in that they are reasonably calculated to inform the real property owner of the impending tax lien sale (*see Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [1950]; *see also Kennedy v Mossafa*, 100 NY2d 1 [2003]; *Matter of McCann v Scaduto*, 71 NY2d 164 [1987]). Proper service of the notice of intention to sell the tax lien pursuant to Administrative Code § 11-320 is a condition precedent to the commencement of a foreclosure action and the plaintiff has the burden of establishing satisfaction of this condition (*see NYCTL 2009-A v Morris*, 144 AD3d 649).

To the extent defendants, Hau Yiu Cheng and Long Mei Kong, assert plaintiffs have failed to establish *prima facie* that they (defendants Hau Yiu Cheng and Long Mei Kong) were provided with actual notice of the tax lien sale, plaintiffs do not allege in the complaint that such notice was so provided and did not offer any affidavits of service of the notices of the intention to sell the tax lien in support of their motion. Although plaintiffs contend that defendants, Hau Yiu Cheng and Long Mei Kong, did not raise lack of notice of the tax lien sale in their answer, it is a defense which may be raised at any time.

Although a party moving for summary judgement cannot meet its *prima facie* burden by submitting evidence for the first time in reply (*see Arriola v City of New York*, 128 AD3d 747, 749 [2d Dept 2015]; *Poole v MCPJF*, 127 AD3d 949, 950 [2d Dept 2015]; *Tingling v C.I.N.H.R. Inc.*, 74 AD3d 954 [2d Dept 2010]), and generally, evidence submitted for the first time in reply papers should be disregarded by the court (*see e.g. Adler v Suffolk County Water Auth.*, 306 AD2d 229, 230 [2d Dept 2003]), exceptions to the rule arise when the evidence submitted is in response to allegations raised for the first time in the opposition papers (*see David v Chong Sun Lee*, 106 AD3d 1044, 1045 [2d Dept 2013]; *Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621 [2d Dept 2008]; *Ryan Mgt. Corp. v Cataffo*, 262 AD2d 628 [2d Dept 1999]). Therefore, the court shall consider the affidavit of Pamela Parker-Cortijo, the tax lien ombudsman for the Department of Finance of the City of New York (DOF) and assistant commissioner for the Collections Division of the DOF, the copies of the notices of intention to

sell the tax lien and a computer-generated document, offered by plaintiffs, in reply, to establish that defendants, Hau Yiu Cheng and Long Mei Kong, were sent notice of the tax lien sale.

Ms. Parker-Cortijo indicates her statements are based upon her personal knowledge, review of the records maintained by the DOF and conversations with the DOF employees. She states that the DOF mailed prior written notice of its intention to sell the tax lien by first class mail to Hau Yiu Cheng and Long Mei Kong at 4331 Bowne Street, Flushing, New York, “start[ing]” “on or about February 10, 2015” and that “the notices were mailed not less than thirty days prior to the date of sale.” Even if the court were to consider the records relied upon by Parker-Cortijo to be admissible under the business records exception to the hearsay rule (*see* CPLR 4518[a]), her statement is conclusory and insufficient to establish that the required notices pursuant to Administrative Code § 11-320 were sent to defendants, Hau Yiu Cheng and Long Mei Kong, four separate times, in accordance with the time frames set forth in that section. Plaintiffs additionally have failed to present a copy of any 10-day notice of intention to sell the tax lien which is alleged to have been mailed to defendant, Long Mei Kong. Under such circumstances, plaintiffs have failed to establish summary judgment against defendants, Hau Yiu Cheng and Long Mei Kong.

Those branches of the motion by plaintiffs for summary judgment against defendants, Hau Yiu Cheng and Long Mei Kong, and to strike the answer of defendants, Hau Yiu Cheng and Long Mei Kong, are denied. That branch of the motion by plaintiffs for leave to appoint a referee is denied at this juncture.

Dated: March 15, 2017

DARRELL L. GAVRIN, J.S.C.